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In the Supreme Court of the United States

OCTOBER TERM, 1968

CUMBERLAND FARMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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No. 456

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioner challenges the enforcement of a Labor Board order directing it to bargain with the union which won a Board-conducted election at petitioner's Canton, Massachusetts dairy processing plant. Petitioner's sole contention is that the Board has abused the broad discretion under Section 9(b) of the National Labor Relations Act to "decide in each case whether * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *."

Prior to the election, the Board had determined that truck drivers and certain other of petitioner's out-of-plant employees should be included with production employees in a single unit, in view of their "substantial community of interest * * * and since no other labor organization is seeking to represent the drivers and allied categories separately * * *" (J.A. 8, n.1).[1] After the union won the election, petitioner refused to bargain with it, claiming that the Board's unit determination was arbitrary in light of principles previously enunciated in *E. H. Koester Bakery Co.*, 136 NLRB 1006, for determining whether truck drivers should be included in more comprehensive units.[2] In ensuing unfair-labor-practice proceedings, the Board refused to reconsider the unit issue for want of new evidence and directed petitioner to bargain (J.A. 58, 62, 68-69).

On petition for enforcement, the court of appeals remanded to the Board for reconsideration and a fuller articulation specifically of the application of

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[1] "J.A." refers to the Joint Record Appendix in the court below.

[2] In *Koester Bakery*, the Board had held that it would consider: "(1) Whether [truckdrivers] have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether they are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities. If the interests shared with other employees is sufficient to warrant their inclusion, we shall include the truckdrivers in the more comprehensive unit. If, on the other hand, the truckdrivers are shown to have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups, we shall exclude them." 136 NLRB at 1011.

the *Koester Bakery* criteria to this case. In response, the Board fully considered that question and reaffirmed its prior action, finding "a sufficient community of interest between the truck drivers and others on the one hand and the in-plant employees on the other, so as to warrant their inclusion in a single overall unit" (App., *infra*, pp. 11-12). The court of appeals enforced the Board's order, finding that the factual differences between this case and *Koester Bakery*, although slight, were sufficient to permit the Board to reach the conclusion it had (Pet. 18).

The facts relating to the unit issue and the Board's reasoning process are adequately set out in its decision on remand (App., *infra*, pp. 6-13). Petitioner does not challenge the propriety of the principles enunciated in *Koester Bakery*, but alleges only that the Board's conclusion was "arbitrary" because it differs from conclusions the Board reached in *Koester* and two other cases.[3] But the Board found on remand that

> there are crucial differences in this case which demonstrate a closer tie between the in-plant employees and the employees in question. * * * [T]he tank drivers and the in-plant production employees share common supervision. Some of the loaders and mechanics receive the same mode of compensation as the plant employees, and on occasion there has been an interchange of work between the loaders and production employees.

[3] *Koester Bakery, supra; American Bread Co.*, 170 NLRB No. 19, March 13, 1968; *Southland Paint Co.*, 156 NLRB 22, 40. The Board found in each of these cases that, on their particular facts, a community of interest was lacking.

> The drivers sometimes load their own trucks, and occasionally fill in as loaders and assist in the loading of trucks other than their own. During slack periods, loaders may make truck runs. There is evidence of transfer; some of the truck drivers fo[r]merly worked in other classifications. In addition, all employees share in similar vacation, holiday, insurance benefits, and plant facilities. The drivers here, one group of whom make long hauls to collect raw milk and bring it to the processing plant, and the other group of whom take the milk from the plant to the retail distribution points, are in their function more closely related to the production process than the sales function of the *Koester* drivers. [App., *infra*, p. 11.]

As the court of appeals correctly held, these factors establish an adequate basis for the Board's conclusion.

In essence, petitioner is asking for a second review on the facts of a decision as to which the Board is vested by statute with particularly broad discretion. Thus, it presents no issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1968.

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 1-CA-4821

CUMBERLAND FARMS, INC.

and

LOCAL 653, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

SUPPLEMENTAL DECISION AND ORDER

On January 11, 1966, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Charging Union, as collective-bargaining representative of all production and maintenance employees, including truck drivers, mechanics and loaders at Respondent's Canton, Massachusetts, plant. Thereafter, the Board filed a petition with the United States Court of Appeals for the First Circuit for enforcement of its Order. The Court denied enforcement of the Board's Order and remanded the case for an articulation of the basis for including truck drivers, mechanics, and loaders in the unit found appropriate.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

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[1] 156 NLRB 712.

[2] *N.L.R.B.* v. *Cumberland Farms, Inc.*, —— F. 2nd —— (C.A. 1), 64 LRRM 2021.

tional Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

In remanding the case for further consideration of the unit issue, the Court expressed doubt whether the Board had properly applied the criteria set forth in *E. H. Koester Bakery Co.*, 136 NLRB 1006, by including the above job categories in the same unit with production and maintenance employees. Thus, the Court noted that there was inadequate explication of the showing of a community of interest, as required by *Koester Bakery*, between truck drivers, mechanics, and loaders and other employees of the Respondent's Canton plant. We have accepted the Court's remand, and we have reconsidered our original decision in the instant case, the earlier decision in the underlying representation case, the criteria set forth in *Koester Bakery*, and the entire record in these proceedings, and we find, for the considerations set forth below, no compelling reason to modify our unit holding.

The facts with respect to the unit, as well as to the refusal to bargain, are not in dispute, and are summarized below.

In April 1964, the Union filed a representation petition seeking to represent a unit of production and maintenance employees, including tank and delivery truck drivers, mechanics and loaders at the Respondent's Canton, Massachusetts, plant. The position of the Respondent at the hearing held on the petition, and which it has maintained during all subsequent proceedings, was that the tank truck drivers, the delivery truck drivers, the loaders, and the mechanics are functionally engaged in the transportation and the delivery of Respondent's products and not with their production, have little or no contact with the plant employees, and in other ways have dissimilar interests from plant employees. The Respondent's

contention was that the facts herein are similar to the facts in *Koester Bakery*, in which the Board excluded truck drivers and mechanics from a production and maintenance unit, and that that case is dispositive of the instant unit determination.

The Respondent is engaged in the processing, packaging and distribution of milk and related products. There has been no prior history of collective bargaining. At the time of the representation hearing, Respondent employed some 60 nonsupervisory-nonclerical employees. Among these were 7 to 9 tank truck drivers who make long haul runs to pick up milk at various depots in other states and return it to the Canton plant for processing; approximately 20 delivery truck drivers who deliver the milk and other dairy products after processing to local retail stores operated by Respondent's corporate affiliates; 6 or 7 mechanics who work in a garage at the Canton plant and apparently perform repairs on both the tank and delivery trucks; and the 8 to 10 loaders or platform men who load and unload the trucks either alone or by assisting the truck drivers.[3]

The tank drivers are under the supervision of the Plant Manager, who also supervises the in-plant production employees, while the delivery truck drivers, the mechanics, and the loaders are each separately supervised by their own foreman. The loaders, as well as some of the mechanics, are hourly paid, as are the in-plant production employees. Other of the mechan-

[3] Thus the Respondent would have excluded more than half of the employees from the unit originally requested by the Union. By the time the election was conducted, the Respondent had closed its operation in Woonsocket, Rhode Island, and had transferred many of the employees who worked there to Canton, and the number of eligible voters at the date of the election was about 100.

ics are paid a weekly salary, and both the tank truck and the delivery truck drivers are paid by the trip. All employees share in similar vacation, holiday, Blue Cross and group insurance benefits.

While the trucks are normally loaded by the loaders, the drivers sometimes load their own trucks and occasionally fill in as loaders and assist in the loading of trucks other than their own. On occasion there has been an interchange of work between the loaders and the production employees, and during slack periods loaders may make truck runs. An unspecified number of drivers were previously employed in other classifications. The loaders work on a platform some 50 to 100 feet from the in-plant employees, and the mechanics work in a separate garage area. The truck drivers spend most of their working time away from the plant. The tank drivers and the delivery drivers apparently have no contact with each other while at or away from the plant, and there is no interchange of duties between them.

Based essentially upon the above facts, the Regional Director found that there was a substantial community of interest between the truck drivers, mechanics and loaders and the in-plant production employees, found a broad production and maintenance unit including truck drivers, mechanics and loaders appropriate, and directed an election therein. Respondent's request for review of the Regional Director's Decision and Direction of Election by the Board was granted, but limited to an unrelated issue, and the Regional Director's unit determination was affirmed. After winning the ensuing election, the Union, on November 5, 1964, was certified as the exclusive bargaining representative of Respondent's employees in the above unit.

Respondent has concededly refused to bargain with the Union, urging, as noted above, that the Board

erred in including truck drivers, mechanics and loaders in the same unit with in-plant employees, contrary to the finding in *Koester Bakery*, which the Respondent contends compels their exclusion.

In *Koester Bakery*, the Board re-examined and abandoned its earlier rigid practice of automatically including truck drivers in more comprehensive units whenever the parties disagreed on their unit placement.[4] Finding that this blanket policy amounted to a refusal to consider the unit placement of drivers "on the merits," the Board announced in that case that it would "return to the approach of predicating their unit placement in each case upon a determination of their community of interest" with the employees in the more comprehensive unit. The following guidelines were set forth as the bases for making such determinations:

> ". . . (1) Whether [truckdrivers] have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether [truckdrivers] are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities. If the interests shared with other employees is sufficient to warrant their inclusion, we shall include the truckdrivers in the more comprehensive unit. If, on the other hand, truckdrivers are shown to have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups, we shall exclude them." (at 1011)

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[4] See, e.g., *Thomas Electronics, Inc.*, 107 NLRB 614, and *The Valley of Virginia Cooperative Milk Producers Association*, 127 NLRB 785.

We agree with the Respondent that certain facts relied upon by the Board in *Koester Bakery* for excluding the truck drivers in question are present here. Thus, both the tank drivers and the delivery drivers are functionally engaged in the transportation, rather than the production, of Respondent's products, and they, like the mechanics and loaders, perform their duties outside the plant. However, in our opinion, there are crucial differences in this case which demonstrate a closer tie between the in-plant employees and the employees in question. As noted above, the tank drivers and the in-plant production employees share common supervision. Some of the loaders and mechanics receive the same mode of compensation as the plant employees, and on occasion there has been an interchange of work between the loaders and production employees. The drivers sometimes load their own trucks, and occasionally fill in as loaders and assist in the loading of trucks other than their own. During slack periods, loaders may make truck runs. There is evidence of transfer; some of the truck drivers fomerly worked in other classifications. In addition, all employees share in similar vacation, holiday, insurance benefits, and plant facilities. The drivers here, one group of whom make long hauls to collect raw milk and bring it to the processing plant, and the other group of whom take the milk from the plant to the retail distribution points, are in their function more closely related to the production process than the sales function of the *Koester* drivers.

On the basis of above facts and the entire record, we can not agree with the Respondent that the truck drivers are shown to have such a diversity of interest from the in-plant employees as to negate any mutuality of interest between the two groups. We, therefore, reaffirm our finding that there is a sufficient

community of interest between the truck drivers and others on the one hand and the in-plant employees on the other, so as to warrant their inclusion in a single overall unit.[5] Accordingly, we reaffirm our previous findings that Respondent engaged in unfair labor practices by failing to recognize and bargain with the Union as majority representative in the certified appropriate unit.

SUPPLEMENTAL ORDER

On the basis of the foregoing, and on the basis of the record as a whole, the National Labor Relations

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[5] In making this finding, we are not holding that the broad unit herein found appropriate is the only appropriate unit. Respondent, on the other hand, argues that under *Koester* the only appropriate unit for the plant employees must exclude the employees in question. This is too rigid a reading of *Koester*, as we pointed out in *Marks Oxygen of Alabama*, 147 NLRB 228, issued approximately a month after the Regional Director issued his Decision and Direction of Election, and approximately one week after the Board affirmed the Regional Director's unit finding herein. *Marks Oxygen* specifically stated that *Koester Bakery* did not overrule our well-settled policy that it is not essential that the unit sought by the petitioning union be the *most* appropriate unit. The Board further noted that while *Koester Bakery* reversed the policy requiring the inclusion of drivers in the broad production and maintenance unit when the parties were in disagreement over their unit placement, it did not reverse our existing principles that a community of interest exists between drivers and production employees based upon "the flow of materials and products into and out of the plant," and that a plant-wide unit is presumptively appropriate. Additionally, we note that the truck drivers in *Marks Oxygen* who were included in the production and maintenance unit, unlike here, did not share some common supervision, mode of compensation, and there was no showing that the truck drivers in question formerly worked in other classifications.

Board reaffirms its Order of January 11, 1966, in this proceeding.

Dated, Washington, D. C.

JOHN H. FANNING, Member
GERALD A. BROWN, Member
HOWARD JENKINS, JR., Member
National Labor Relations Board

(SEAL)

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